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THE PINES V. CITY OF SANTA MONICA: REDEFINING THE FOCUS OF CALIFORNIA'S SUBDIVISION MAP ACT

I. INTRODUCTION

The unprecedented population growth California has experienced in recent decades has led to a parallel growth in the need for housing, and, consequently, to a proliferation of residential subdivisions. The spread of new subdivisions across the California landscape has created serious financing problems for local governments responsible for providing community infrastructure—schools, roads, parks, flood control, and sewage disposal facilities—to serve the new neighborhoods.¹

The passage in 1978 of Proposition 13,² California's celebrated property tax limitation initiative, has further aggravated the problems of local governments by severely restricting their capacity to generate revenues through real property taxes.³ These restrictions have forced local governments to take a fresh look at both the costs imposed and the revenues generated by new development.⁴

In an effort to offset the revenue shortfall, many localities have attempted to circumvent Proposition 13 by imposing fees, charges and

1. See generally Taylor, *Current Problems in California Subdivision Control*, 13 HASTINGS L.J. 344 (1962); Hanna, *Subdivisions: Conditions Imposed by Local Governments*, 6 SANTA CLARA LAW. 1972 (1966); Frieden, *The New Regulation Comes to Suburbia*, THE PUB. INTEREST, Spring, 1979, at 15 [hereinafter cited as Frieden].

2. Proposition 13 added Article XIII A to the California Constitution. Section 1(a) of Article XIII A provides: "The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax [is] to be collected by the counties and apportioned according to law to the districts within the counties."

3. LEGISLATIVE ANALYST, STATE OF CALIFORNIA, AN ANALYSIS OF THE EFFECT OF PROPOSITION 13 ON LOCAL GOVERNMENTS, at 3 (1979). For additional background on the effects of Proposition 13 on local government financing, see JOINT LEGISLATIVE AUDIT COMMITTEE, OFFICE OF THE AUDITOR GENERAL, CHANGES IN THE COMPOSITION OF LOCAL GOVERNMENT REVENUE SINCE PROPOSITION 13 (1980); REPORT OF OFFICE OF PLANNING AND RESEARCH, EDMUND G. BROWN JR., GOVERNOR, THE GROWTH REVOLT: AFTERSHOCK OF PROPOSITION 13? (1980); LEGISLATIVE ANALYST, STATE OF CALIFORNIA, AN ANALYSIS OF THE EFFECT OF PROPOSITION 13 ON LOCAL GOVERNMENTS (1979); Naumann, *Local Government Taxing Authority Under Proposition 13*, 10 SW. U.L. REV. 795 (1978).

4. One result of this sharpened focus has been the use of cost/impact models that assist local officials and developers objectively to assess the costs of new development, and to fashion means to meet those costs. FINAL REPORT OF THE ASSEMBLY SELECT COMMITTEE ON LOCAL IMPLEMENTATION OF TAX AND SPENDING INITIATIVES 17-18 [hereinafter cited as FINAL REPORT].

assessments on new residential development.⁵ Although such exactions are by no means a new phenomenon,⁶ Proposition 13 has increased their popularity. Generally, these exactions force developers to provide or finance both on and off-site capital improvements by conditioning permission to subdivide or build upon payment of the exaction.⁷

Increased reliance on subdivision exactions to replace lost property tax revenues raises troubling questions for the state as a whole. The charges imposed are typically passed on to purchasers of homes in the new development.⁸ Accordingly, some argue that newcomers to the community are forced to bear a disproportionate share of the cost of community infrastructure, whereas long-time residents of older sections of the community benefit by infrastructure which was financed by pre-Proposition 13 property taxes.⁹

Others suggest that increased local power to condition subdivision approval on payment of exactions may reduce the supply of affordable housing throughout the state.¹⁰ Research indicates that low-density, high-value housing tracts produce more desirable fiscal results for a locality than do higher-density, more moderately priced tracts.¹¹ Cities and counties, understandably preoccupied with compelling local financing problems, and relatively unconcerned about a statewide housing shortage, may be expected to use their exaction power to favor low-density housing.¹²

The mechanism for accommodating the competing interests of

5. *Id.* See also Note, *Subdivision Land Dedication: Objectives and Objections*, 27 STAN. L. REV. 419 (1975) [hereinafter cited as Note, *Subdivision Land Dedication*].

6. See, e.g., *City of Los Angeles v. Rancho Homes, Inc.*, 40 Cal. 2d 764, 256 P.2d 305 (1953); *Associated Home Builders, Inc. v. City of Newark*, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971).

7. FINAL REPORT, *supra* note 4, at 18. Examples include exactions to defray costs of sewer construction, drainage facilities, park and recreational facilities and school construction. See generally Hanna, *supra* note 1.

8. 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.24 (1968). See Note, *Subdivision Land Dedication*, *supra* note 5, at 428 n.24, 443; Harvith, *Subdivision Dedication Requirements—Some Observations and an Alternative: A Special Tax on Gain from Realty*, 33 ALBANY L. REV. 474, 475-76 (1969).

The constitutionality of requiring new residents to bear the cost of facilities made necessary by their entry into the community is no longer open to question. For a discussion of the relevant decisions, see *Municipalities: Validity of Subdivision Fees for Schools and Parks*, 66 COLUM. L. REV. 974, 975 (1966). A different question is raised, however, when newcomers are required to assume costs of infrastructure previously borne by the community at large. This is the concern voiced in FINAL REPORT, *supra* note 4.

9. FINAL REPORT, *supra* note 4, at 18.

10. *Id.* at 18-19.

11. *Id.* at 19.

12. *Id.* See also Frieden, *supra* note 1, at 18.

statewide needs and local control over development is California's Subdivision Map Act.¹³ The Map Act is in part a form of enabling legislation authorizing local governments to require developers to fulfill certain requirements for the design and improvement of their developments as a condition of subdivision map approval.¹⁴ Until recently, California courts resisted local government efforts to use subdivision exactions as a means of raising revenues for general city purposes by focusing on the Map Act's requirement that exactions be reasonably related to needs created by the subdivision.¹⁵ In the absence of such a relationship, local exactions have been struck down as preempted by the Map Act.¹⁶ A recent California Supreme Court decision, however, has reversed that pattern by rejecting the reasonable relationship standard, focusing Map Act analysis instead on the *nature* of the exaction, i.e., whether the payment is designated a fee or a tax. In *The Pines v. City of Santa Monica*,¹⁷ the court upheld Santa Monica's Condominium Tax Law.¹⁸ In the form upheld by the court,¹⁹ the Condominium Tax Law required developers of new or newly converted condominiums to pay a one-time charge of \$1,000 per planned salable unit as a condition precedent to subdivision map approval.²⁰ The tax was designated a business license tax. Unlike conditions on subdivision approval previously upheld by the courts, however, the Condominium Tax Law did not earmark revenues for any purpose related to the subdivision in question, but required them to be deposited directly into the city's general fund.²¹ By thus refocusing Map Act analysis, *Pines* increased local power to generate general revenues at the expense of new community residents.

13. CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1982) [hereinafter cited as the Map Act].

14. See *infra* notes 62-79 and accompanying text.

15. See *infra* notes 64-78 and accompanying text.

16. See, e.g., *Santa Clara County Contractors Ass'n v. City of Santa Clara*, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965); *Newport Bldg. Corp. v. City of Santa Ana*, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962); *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

17. 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

18. SANTA MONICA, CAL., MUN. CODE art. VI, ch. 6B, §§ 6651-6658 (1973).

19. The Condominium Tax Law was amended in 1978. See *infra* note 115 and accompanying text. The court in *Pines*, however, construed the 1973 version, which will be referred to throughout this note.

20. Subdivision maps must be prepared and filed with local authorities for subdivisions creating, among other things, five or more condominiums. CAL. GOV'T CODE § 66426 (West Supp. 1982).

21. 29 Cal. 3d at 659, 630 P.2d at 521, 175 Cal. Rptr. at 336; see *infra* notes 60-61, 111-15 and accompanying text.

This note analyzes the holding and rationale of *Pines* in light of the Map Act's history in the California courts and concludes that the decision reached by the supreme court was unwarranted. It also addresses the question of whether taxes like the Condominium Tax Law should be considered "special taxes" within the meaning of Article XIII, section four of the California Constitution.²²

II. THE FACTS

The Pines was one of eight plaintiffs, each of which was a limited partnership formed for the purpose of acquiring land in the city of Santa Monica, developing condominium projects on the land, and selling the completed units.²³ In conformity with the requirements of the Map Act,²⁴ plaintiffs submitted tentative and final subdivision maps to the city for approval.²⁵ Subsequently, the city notified plaintiffs that it would not approve the maps unless plaintiffs either paid the tax required by the Condominium Tax Law or signed an agreement, secured by a lien on the property, that payment would be made.²⁶

Plaintiffs paid the tax, which amounted to the total sum of \$138,000 plus interest,²⁷ and then filed claims for refund.²⁸ They asserted that the Condominium Tax Law contravened the Map Act by conditioning subdivision approval on the payment of a tax,²⁹ that subdivision development and construction are matters of statewide concern; and that legislation in an area of statewide concern (here, the Map Act) preempts conflicting regulation by a charter city.³⁰ Santa Monica, on the other hand, contended that, as a charter city, it was constitutionally empowered to impose the tax, regardless of the provisions of the Map Act.³¹ The trial court ruled the tax invalid for the reasons asserted by plaintiffs.³² The California Supreme Court

22. See *infra* note 230.

23. All of the eight plaintiffs were limited partnerships formed for the same purpose. Opening Brief of Appellant at 15-16, *The Pines v. City of Santa Monica*, 108 Cal. App. 3d 577, 166 Cal. Rptr. 649 (1980), *vacated*, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

24. See *supra* note 20.

25. Respondents' Brief at 2-3, *The Pines v. City of Santa Monica*, 108 Cal. App. 3d 577, 166 Cal. Rptr. 649 (1980), *vacated*, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

26. 29 Cal. 3d at 659, 630 P.2d at 521, 175 Cal. Rptr. at 336.

27. *Id.* at 658, 630 P.2d at 521, 175 Cal. Rptr. at 336.

28. *Id.*

29. *Id.* at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337.

30. *Id.*

31. See *infra* note 103.

32. 29 Cal. 3d at 658, 630 P.2d at 521, 175 Cal. Rptr. at 336.

reversed.³³

III. REASONING OF THE COURT

The supreme court did not address the issue framed by the parties: whether the Map Act preempted the Condominium Tax Law.³⁴ Instead, the court concluded that the Map Act and the Condominium Tax Law were not in conflict; hence, there was no need to reach Santa Monica's argument that local taxation is a municipal affair in which legislation by a charter city prevails over conflicting state law.³⁵

To reach the conclusion that state and local law did not conflict, the court was forced to disapprove a line of court of appeal decisions that had construed the Map Act as a limitation on local taxing power.³⁶ Under the reasoning of those decisions, because the authority granted to local governments by the Map Act is confined to the regulation of subdivision design and improvement, any local charge unrelated to design and improvement is an invalid interference with the statutory scheme for subdivision regulation.³⁷

The *Pines* court held that the earlier cases contravened the general principle that local governments may tax activities regulated by the state.³⁸ Because local governments may tax businesses and professions governed by state licensing schemes, the court reasoned, Santa Monica should be able to tax the subdivision of land for development despite the existence of a state scheme regulating subdivisions.³⁹ The court distinguished cases in which local business license tax ordinances had been invalidated,⁴⁰ explaining that the ordinances involved in those cases contained regulatory features which conflicted with the state regulatory scheme in question. The Condominium Tax Law, on the other

33. 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

34. For a general discussion of preemption analysis, see *infra* notes 103 & 119; 116-21 and accompanying text.

35. 29 Cal. 3d at 664 n.3, 630 P.2d at 525 n.3, 175 Cal. Rptr. at 340 n.3.

36. See *Benny v. County of Alameda*, 105 Cal. App. 3d 1006, 164 Cal. Rptr. 776 (1980); *Santa Clara County Contractors Ass'n v. City of Santa Clara*, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965); *Newport Bldg. Corp. v. City of Santa Ana*, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962); *Wine v. Council of Los Angeles*, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960); *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

37. 29 Cal. 3d at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337. For further discussion of the Map Act and its requirements, see *infra* notes 62-79 and accompanying text.

38. 29 Cal. 3d at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337.

39. *Id.* at 660-61, 630 P.2d at 522-23, 175 Cal. Rptr. at 338.

40. See, e.g., *Agnew v. City of Culver City*, 51 Cal. 2d 474, 334 P.2d 571 (1959); *Agnew v. City of Los Angeles*, 51 Cal. 2d 1, 330 P.2d 385 (1958); *Biber Electric Co. v. City of San Carlos*, 181 Cal. App. 2d 342, 5 Cal. Rptr. 261 (1960); *Lynch v. City of Los Angeles*, 114 Cal. App. 2d 115, 249 P.2d 856 (1952).

hand, was a purely revenue-raising measure with no regulatory aspects.⁴¹

The *Pines* court rejected plaintiffs' argument that the Map Act's legislative history evinced a legislative intent that the Map Act preempt local subdivision taxes.⁴² This argument was based on two separate legislative developments. First, plaintiffs contended that when the legislature recodified the Map Act in 1974 without substantial revision, it adopted the existing judicial construction of the Map Act as a limitation on local taxing power.⁴³ In rejecting this view, the court determined that the legislature's intentions were not sufficiently clear to warrant such a conclusion.⁴⁴ The court also summarily dismissed plaintiffs' argument that because the legislature had failed to pass two bills which proposed to expand local authority to regulate subdivisions, the legislature must have intended *not* to expand local authority.⁴⁵ The *Pines* court reasoned that because the proposals were only parts of bills intended to recodify the entire Map Act, it would be unreasonable to conclude that failure to pass the bills indicated legislative rejection of the proposals.⁴⁶

Finally, the *Pines* court concluded that the Condominium Tax Law was not made regulatory by the requirement of payment of the tax as a condition precedent to approval of the subdivision, as plaintiffs contended. Rather, the court viewed the condition as a valid means of revenue enforcement.⁴⁷

Thus, the *Pines* court held that the Condominium Tax Law "imposes a revenue tax that does not conflict with the state scheme for regulating subdivisions."⁴⁸ Earlier cases construing the Map Act,⁴⁹ to the extent they disagreed with this conclusion, were disapproved.⁵⁰

IV. BACKGROUND

A. *The Map Act*

In its present form, the Map Act is the product of ninety years of

41. 29 Cal. 3d at 661-62, 630 P.2d at 523, 175 Cal. Rptr. at 338.

42. *Id.* at 662-63, 630 P.2d at 523-24, 175 Cal. Rptr. at 339.

43. *Id.* at 662, 630 P.2d at 523-24, 175 Cal. Rptr. at 339.

44. For further discussion, see *infra* note 194.

45. 29 Cal. 3d at 662-63, 630 P.2d at 524, 175 Cal. Rptr. at 339.

46. *Id.*; for further discussion of the Map Act's legislative history and its treatment by the *Pines* court, see *infra* note 194.

47. *Id.* at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

48. *Id.* at 664, 630 P.2d at 525, 175 Cal. Rptr. at 340.

49. See *supra* note 36.

50. 29 Cal. 3d at 664, 630 P.2d at 525, 175 Cal. Rptr. at 340.

evolution. Its earliest ancestor,⁵¹ enacted in 1893, was concerned primarily with accurate land description and required only that the owner of land developed into lots for sale file a map of the subdivision with the County Recorder.⁵² In subsequent years, as the legislature came to recognize the important role that the subdivision of land plays in urban development,⁵³ the Map Act underwent periodic amendment.⁵⁴ By 1937, the Act had assumed its present general form,⁵⁵ although the legislature has continued to amend it from time to time.⁵⁶

The Map Act is a comprehensive statutory scheme governing subdivision approval.⁵⁷ Its purposes are (1) to coordinate new subdivision designs with existing development⁵⁸ and (2) to require subdividers to provide necessary subdivision improvements which are then dedicated to local government.⁵⁹ To attain these ends, the Map Act requires that tentative and final maps be approved by the responsible city or county for all subdivisions creating five or more parcels, five or more condominiums, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units.⁶⁰ The cornerstone of the Map Act is the requirement that no parcel be sold and no construction be commenced until a final map has been recorded in full compliance with the Map Act and any local ordinances enacted under its

51. 1893 Cal. Stat., ch. 80, secs. 1-4.

52. *Id.* at sec. 3.

53. See R. RATCLIFF, URBAN LAND ECONOMICS 415 (1949); Taylor, *supra* note 1.

54. 1907 Cal. Stat., ch. 231 (adding requirements for public approval, naming of subdivisions, drawing of maps); 1929 Cal. Stat., ch. 837, secs. 1-40.

55. 1937 Cal. Stat., ch. 670 (current version at CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1982)).

56. In 1965 the legislature amended the Map Act, then a division of CAL. BUS. & PROF. CODE, to add § 11546 (now CAL. GOV'T CODE § 66477 (West Supp. 1982)), which authorized municipalities to require dedication of land for park purposes, or payment in lieu thereof, as a condition of map approval. 1965 Cal. Stat., ch. 1809, sec. 2, at 4183. In 1974 the entire Map Act was repealed and reenacted in the Government Code. 1974 Cal. Stat., ch. 1536, sec. 4, at 3464.

57. The Map Act contains 177 sections divided into seven chapters, including general provisions and definitions (§§ 66410-66424.6), requirements for and content of maps (§§ 66245-66450), procedures for subdivision approval (§§ 66451-66472.1), requirements and conditions of subdivision approval (§§ 66473-66498), improvement security (§§ 66499-66499.10), reversions and exclusions (§§ 66499.11-66499.29), and enforcement and judicial review (§§ 66499.30-66499.37).

58. *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 638, 318 P.2d 561, 565 (1957). See CAL. GOV'T CODE § 66411 (West Supp. 1982).

59. *Hoover v. Kern County*, 118 Cal. App. 2d 139, 142, 257 P.2d 492, 494 (1953). See CAL. GOV'T CODE § 66411 (West Supp. 1982); *Benny v. City of Alameda*, 105 Cal. App. 3d 1006, 1011, 164 Cal. Rptr. 776, 778-79 (1980).

60. CAL. GOV'T CODE § 66426 (West Supp. 1982).

authority.⁶¹

The Map Act is a form of enabling legislation authorizing cities and counties to adopt conforming ordinances to implement its provisions.⁶² However, the Act limits local lawmaking power to enactments which are specifically or impliedly authorized by the Act.⁶³ Express limitations on local government power to condition map approval on the payment of fees or the dedication of land exist in the Map Act itself. Chief among the limitations is the requirement that there be a reasonable relationship between the payment or dedication and the infrastructure needs generated by the subdivision.⁶⁴ This restriction is expressed in the Map Act's requirement that local ordinances be limited to the regulation of the design and improvement of subdivisions,⁶⁵ as these terms are specifically defined.⁶⁶ State and federal constitutional guarantees of equal protection and due process, of course, further limit local power.⁶⁷

The kind of local ordinance authorized by the Map Act is one "regulating the design and improvements of subdivisions, insofar as the provisions of the ordinance are consistent with and not in conflict with the provisions of this division."⁶⁸ The distinction between "design" and "improvement" intended by the legislature is not entirely clear. "Design" includes such matters as street alignments, grades and widths, drainage and sanitary facilities and utilities, location and size of easements and rights of way, fire roads, lot sizes, traffic access, grading, and land to be dedicated for park or recreational purposes.⁶⁹ "Improvement" refers to street work, utilities, and other such items necessary for

61. *Id.* at § 66499.30.

62. *Id.* at § 66411.

63. *Id.* at § 66421; *see Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 37, 207 P.2d 1, 5 (1949).

64. This rule is rooted in the due process clauses of the federal and state constitutions, which prohibit government from depriving the subdivider of his or her property without just compensation. U.S. CONST. amends. V and XIV; CAL. CONST. art. 1 § 14. The subdividers' argument is that by requiring them to dedicate land or pay fees not required by the subdivision itself, the city forces subdividers to pay for facilities enjoyed by the city as a whole, which should rightfully be underwritten by all citizens.

65. CAL. GOV'T CODE § 66411 (West Supp. 1982).

66. *See infra* notes 68-70 and accompanying text.

67. U.S. CONST. amends. V and XIV; CAL. CONST. art. 1 § 14; *see Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

68. CAL. GOV'T CODE § 66421 (West Supp. 1982).

69. *Id.* at § 66418. "Design" also includes "such other specific requirements in the plan and configuration of the entire subdivision as may be necessary or convenient to insure conformity to or implementation of the general plan . . . or any specific plan . . ." *Id.*

the general use of lot owners in the subdivision and neighborhood traffic and drainage needs.⁷⁰ Although the definitions tend to merge, they indicate that the subject matter of local legislation is to be the *physical* nature of the subdivision.

The Map Act also authorizes local governments to exact fees as a condition of subdivision approval for two general purposes: (1) to pay for procedures required or authorized by the Map Act, such as costs of processing tentative and final maps; and (2) to defray costs of constructing specific public works made necessary by the development.⁷¹ The latter category includes fees in lieu of park dedication,⁷² and fees to defray the cost of constructing drainage facilities, sanitary sewer facilities,⁷³ bridges,⁷⁴ and recharge facilities for the replenishment of the underground water supply in the area benefited.⁷⁵ Whenever such a fee is authorized, the Map Act mandates a showing that the subdivision requires the facility for which the fee is charged, and that the fees be *fairly apportioned*, either on the basis of benefits conferred on, or the need created by, the proposed subdivision.⁷⁶

70. *Id.* at § 66419. "Improvement" also includes "such other specific improvements or types of improvements . . . necessary or convenient to insure conformity to or implementation of the general plan . . . or any specific plan" *Id.*

71. *Id.* at § 66451.2.

72. *Id.* at § 66477; see *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (upholding the constitutionality of Government Code § 66477), *appeal dismissed*, 404 U.S. 878 (1971).

73. CAL. GOV'T CODE § 66483 (West Supp. 1982).

74. *Id.* at § 66484.

75. *Id.* at § 66484.5.

76. CAL. GOV'T CODE § 66483 (West Supp. 1982), authorizing fees to construct drainage facilities, provides in pertinent part:

There may be imposed by local ordinance a requirement for the payment of fees for purposes of defraying the actual or estimated costs of constructing planned drainage facilities for the removal of surface and storm waters from local or neighborhood drainage areas and of constructing planned sanitary sewer facilities for local sanitary sewer areas, subject to the following conditions:

(d) The costs, whether actual or estimated, are based upon findings by the legislative body which has adopted the local plan, that subdivision and development of property within the planned local drainage area or local sanitary sewer area will require construction of the facilities described in the drainage or sewer plan, and that the fees are fairly apportioned within such areas either on the basis of benefits conferred on property proposed for subdivision or on the need for such facilities created by the proposed subdivision and development of other property within such area.

CAL. GOV'T CODE § 66484 (West Supp. 1982), authorizing local governments to condition map approval on payment of fees for the construction of bridges or major thoroughfares, provides in pertinent part:

A local ordinance may require the payment of a fee as a condition of approval of a final map or as a condition of issuing a building permit for purposes of de-

The Map Act permits a local ordinance to require that improvements installed by the subdivider for the benefit of the subdivision "contain supplemental size, capacity or number for the benefit of property not within the subdivision" ⁷⁷ The Map Act also requires, however, that the local agency reimburse the subdivider for the portion of the cost of the improvement not expended to serve the subdivision's needs. ⁷⁸

Finally, the Map Act lists the situations in which a local agency's disapproval of a subdivision map would be required. A county or city legislative body must disapprove the proposed map if certain findings are made. ⁷⁹

B. The Kelber Doctrine

California courts have long recognized both the power granted to local governments by the Map Act and the limitations on that power. Thus, in the landmark case of *Ayres v. City Council of Los Angeles*, ⁸⁰ the California Supreme Court upheld a local planning commission's

fraying the actual or estimated cost of constructing bridges over waterways, railways, freeways, and canyons, or constructing major thoroughfares.

Such local ordinance may require payment of fees pursuant to this section if:

...
(c) The ordinance provides that . . . the boundaries of the area of benefit, the costs, whether actual or estimated, and a fair method of allocation of costs to the area of benefit and fee apportionment are established.

CAL. GOV'T CODE § 66484.5 (West Supp. 1982), authorizing fees for the construction of ground water recharge facilities, provides in relevant part:

The legislative body of a local agency may adopt an ordinance requiring the payment of a fee as a condition of approval of a subdivision requiring a final or parcel map, or as a condition of issuing a building permit in an area of benefit under a ground water recharge facility plan adopted as hereinafter provided, for the purpose of constructing recharge facilities for the replenishment of the underground water supply in such area of benefit.

Such local ordinance may require payment of fees pursuant to this section if, at the time of payment:

...
[The ground water recharge plan] shall include the boundaries of the area of benefit, the availability of surface water, the planned facilities for the area of benefit and the estimated cost thereof, a fair method of allocating the costs within the area of benefit, and the apportionment of fees within such area.

77. *Id.* at § 66485.

78. *Id.* at § 66486.

79. Those situations include findings that (1) the proposed map is not consistent with applicable general and specific plans; (2) the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans; (3) the site is not physically suitable for the type or proposed density of development; (4) the design of the subdivision or proposed improvements is likely to cause substantial environmental damage or public health problems; or (5) the design of the subdivision or proposed improvements will conflict with public easements. *Id.* at § 66474.

80. 34 Cal. 2d 31, 207 P.2d 1 (1949).

requirement that a developer dedicate four specific areas of his proposed subdivision for public street and highway purposes as a condition of map approval.⁸¹ The developer argued that the dedications were not expressly authorized by the Map Act because they were not for new streets laid out in the subdivision by the developer, but for extensions or widening of existing streets.⁸² The developer further contended that, because the benefits conferred on the lot owners in the subdivision would be slight, compared to the benefits to the city at large, the conditions effected a taking of his property without just compensation, in the guise of subdivision map proceedings.⁸³

The supreme court in *Ayres* rejected this contention, concluding that the dedication requirements were within the contemplation of the Map Act, which, the court observed, requires that subdivision design conform to local planning and zoning requirements. Without the dedications, the *Ayres* court reasoned, the subdivision would have been "out of harmony with the neighborhood plan and traffic needs."⁸⁴ The court emphasized, however, that the conditions imposed by the commission were reasonably related to needs created by the subdivision:

Where as here no specific restriction or limitation on the city's power is contained in the charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are *not inconsistent* with the map act and the ordinances and are *reasonably required* by the subdivision type and use as related to the character of the local and neighborhood planning and traffic conditions.⁸⁵

Ayres thus established two fundamental propositions: (1) The right of a city to condition map approval upon dedication of land or payment of a fee in lieu thereof, may be *implied* from the Map Act; and (2) the conditions imposed must be reasonably related to needs generated by the subdivision.⁸⁶

81. The areas required to be dedicated were (1) a ten-foot strip adjacent to a main boulevard for purposes of widening the boulevard; (2) another ten-foot strip for planting trees and shrubbery to insulate the subdivision from the boulevard; (3) an eighty-foot strip for purposes of extending a street through the subdivision; and (4) a triangular island, judged a traffic hazard by the commission, that had been created by the extension of another street through the subdivision. *Id.* at 34-35, 207 P.2d at 3.

82. *Id.* at 37, 207 P.2d at 4-5.

83. *Id.* at 39-40, 207 P.2d at 6.

84. *Id.* at 40, 207 P.2d at 6.

85. *Id.* at 37, 207 P.2d at 5 (emphasis added).

86. See Note, *Subdivision Exactions in California: Expansion of Municipal Power*, 23 HASTINGS L.J. 403 (1972) [hereinafter cited as Note, *Subdivision Exactions in California*].

The *Ayres* principles were applied by the court of appeal in *Kelber v. City of Upland*.⁸⁷ The *Kelber* court measured the requirements of local ordinances against the test of *Ayres* to determine "whether they bear such a reasonable relation to the requirements of the act that they may properly be added as a condition precedent to the approval of such a map."⁸⁸ The ordinances required developers to pay (1) a per-lot fee into a fund to be used to acquire park and school sites in the city; and (2) a per-acre fee into a fund to be used to build drainage facilities outside the subdivision. The drainage fund contribution was in addition to a requirement that the subdivider build drainage facilities *within* the subdivision adequate to serve its needs.⁸⁹

In defense of the ordinances, the city argued that "such contributions to funds established for the general benefit of the city . . . [are] in line with the modern tendency to extend the earlier concept of the police power . . . to include the broader field of general welfare"⁹⁰ The *Kelber* court concluded that the ordinances authorizing the fees were inconsistent with the Map Act because they were intended not to regulate the design and improvement of the subdivision, but to raise

Ayres has been widely cited by courts and commentators, some of which have found in the following language support for the proposition that the city may require the developer to pay for improvements to benefit the general public:

It is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration.

34 Cal. 2d at 41, 207 P.2d at 7.

See, e.g., *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Bowden, *Article XXVIII—Opening the Door to Open Space Control*, 1 PAC. L.J. 461, 482 (1970); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1132-33 (1964).

The holding in *Ayres* limits the impact of these dicta, however. The conditions were upheld in that case because they related directly to design and improvement needs created by the subdivision, which made it possible to imply from the Map Act local power to impose them. If the purpose of the dedication had been to benefit the city as a whole, or if the dedication requirement bore no relationship to subdivision design and improvement, it seems likely that the *Ayres* court, which defined the reasonableness standard, would have found a taking of property without due process of law. See *supra* text accompanying note 85.

87. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

88. *Id.* at 636, 318 P.2d at 564.

89. *Id.* at 633, 318 P.2d at 562. Subdividers were required to pay \$30 per lot into the park and school site fund and \$99.07 per subdivision acre into the subdivision drainage fund.

90. *Id.* at 635, 318 P.2d at 564.

funds to meet the needs of the entire city.⁹¹ The court held:

The purpose and intent of the Subdivision Map Act is to provide for the regulation and control of the design and improvement of a subdivision . . . , and not to provide funds for the benefit of an entire city. . . . [T]he power to require the payment of large fees or contributions for general city benefits as a condition of the approval of a map may not reasonably be implied [from the language of the Map Act], and it is entirely inconsistent with the language and apparent intent of the statute. The imposition of such fees as the condition for the approval of such a map not only bears no relation to the requirements indicated in the statute but would directly impede the realization of what appears to be the intent and meaning of the act.⁹²

The Upland ordinances were part of the city's subdivision control ordinance, enacted under authority derived from the Map Act. As previously observed, the Map Act grants cities power to regulate only subdivision design and improvement.⁹³ Because the fees were not reasonably required for subdivision design and improvement, the court determined that they "materially change the requirements necessary for the approval of a map as fixed by the Legislature,"⁹⁴ and thus conflicted with the Map Act.⁹⁵

Kelber's emphasis on whether a statute effects a material change in the requirements for map approval was reiterated in a series of subsequent decisions in the courts of appeal.⁹⁶ The most significant of those decisions for purposes of understanding *Pines* is *Newport Building Corp. v. City of Santa Ana*.⁹⁷

91. It rather clearly appears that these fee provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for park and school sites and drainage facilities, and that they are not reasonable requirements for the design and improvement of the subdivision itself.

Id. at 638, 318 P.2d at 565.

92. *Id.*

93. See *supra* notes 62-79 and accompanying text.

94. 155 Cal. App. 2d at 636, 318 P.2d at 564.

95. *Id.* at 638, 318 P.2d at 566.

96. *Benny v. City of Alameda*, 105 Cal. App. 3d 1006, 164 Cal. Rptr. 776 (1980); *Santa Clara County Contractors Ass'n v. City of Santa Clara*, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965) (a municipality may not use the Map Act for general revenue-raising purposes); *Wine v. Council of Los Angeles*, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960) (proposed conditions that subdividers pay disproportionate sewerage fee into city's general sewerage fund and that they pay the cost of improving off-site streets did not come within definition of design and improvement and, therefore, were not authorized by the Map Act).

97. 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962).

Like Santa Monica,⁹⁸ the city of Santa Ana in *Newport Building* deemed the payment upon which subdivision approval was conditioned to be a business license tax⁹⁹ and contended that the tax "was solely for revenue purposes."¹⁰⁰ The one-time tax was imposed on "[t]he business of subdividing land for residential occupancy" and was measured at the rate of \$50 per lot.¹⁰¹ Its stated purpose was to offset the financial burden that residential subdivisions place on the city. Proceeds of the tax were paid into the city's general "Park and Fire-house Acquisition and Construction Fund."¹⁰²

Also like Santa Monica, the city of Santa Ana in *Newport Building* asserted that its status as a charter city gave it the right to impose taxes for revenue purposes, regardless of the provisions of the Map Act.¹⁰³

98. See *infra* text accompanying notes 110-15.

99. *Id.* at 774, 26 Cal. Rptr. at 798.

100. *Id.* at 775, 26 Cal. Rptr. at 799.

101. *Id.* at 774, 26 Cal. Rptr. at 798 (quoting SANTA ANA, CAL., MUN. CODE art. 1, ch. 3, § 6200.55A (1956)).

102. 210 Cal. App. 2d at 775, 26 Cal. Rptr. at 799.

103. *Id.* at 776, 26 Cal. Rptr. at 800. The argument against preemption in *Pines* turned on the status of both Santa Monica and Santa Ana as charter cities, i.e., cities of a certain designated population that have adopted charters for their own government under the authority of the "home rule" provision of the California Constitution. CAL. CONST. art. XI, § 5. Section 5 empowers charter cities to "make and enforce all ordinances and regulations in respect to *municipal affairs*, subject only to restrictions and limitations provided in their several charters and *in respect to other matters they shall be subject to general laws*." *Id.* (emphasis added). The laws of general law cities, such as Upland, are always subject to preemption if they are found to conflict with state law, regardless of whether the local law deals with "municipal affairs." *Id.*; *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969).

Accordingly, Santa Ana argued in *Newport Building* that local taxation was a "municipal affair" within the meaning of § 5, and that therefore its business license tax ordinance should prevail over the Map Act. 210 Cal. App. 2d at 776, 26 Cal. Rptr. at 800.

Implicit in this argument is the further contention, urged by Santa Monica in *Pines*, that *Kelber* should not control when a charter city's ordinance conflicts with state law because *Kelber*, unlike *Pines*, involved a general law city that lacked the power over municipal affairs possessed by charter cities. However, the charter city/general city debate is relevant only to the question of preemption: whether, when state and local laws conflict, the state or the local law should prevail.

In *Newport Building* the court held that the Map Act should prevail because the "provisions of the state law cover the whole subject of regulation of subdivision except for matters relating to design and improvement," and Santa Ana's ordinance did not relate to design and improvement. *Id.* at 776-77, 26 Cal. Rptr. at 800. The *Pines* court, in contrast, concluded that the Condominium Tax Law *does not conflict* with the Map Act; therefore, it found it unnecessary to apply preemption analysis to determine which law should prevail. For a general discussion of the debate surrounding municipal home rule in California, see Sato, "Municipal Affairs" in *California*, 60 CALIF. L. REV. 1055 (1972); see also Comment, *The California Preemption Doctrine: Expanding the Regulatory Power of Local Governments*, 8 U.S.F.L. REV. 728 (1974) [hereinafter cited as Comment: *California Preemption Doctrine*].

The *Newport Building* court acknowledged Santa Ana's broad power as a charter city to tax and upheld the city's right to impose license taxes for the privilege of carrying on a business or profession.¹⁰⁴ Nevertheless, the court held that when such a tax imposes a condition unrelated to design and improvement, it "quite clearly conflicts with the whole plan of the Subdivision Map Act."¹⁰⁵ Accordingly, the tax was invalidated.¹⁰⁶

The *Newport Building* court followed the reasoning of *Kelber* and determined that the local tax ordinance materially changed the requirements for subdivision approval as fixed by the legislature. *Kelber* had established the rule (the "*Kelber* doctrine"¹⁰⁷) that the power of subdivision approval given to local governments by the Map Act was not intended to be a general revenue-raising tool.¹⁰⁸ The court of appeal agreed with the developers that Santa Ana had exercised its power over subdivision design in a manner for which it was not designed, i.e., to raise revenues. The court of appeal was unconvinced by the additional argument, which assumed such importance in *Pines*, that an ordinance conditioning approval on payment of a *tax for revenue* should receive greater deference than an ordinance conditioning approval on payment of a *fee* unauthorized by the Map Act. As in *Kelber*, the *Newport Building* court focused on the conditioning of map approval; it held that any ordinance that conditioned map approval in a manner unauthorized by the Map Act conflicted with the Map Act, regardless of its formal incidence or name.¹⁰⁹

C. The Condominium Tax Law

Since 1950, Santa Monica has had a subdivision map ordinance enacted under the authority of the Map Act.¹¹⁰ The Condominium Tax Law, however, was not part of that ordinance, and the revenue generated by the tax was not used to pay for facilities or services needed by a particular subdivision. Rather, the tax was set forth in section 6651 of the Santa Monica Municipal Code, which provided for a "condominium business license tax" on the development and construction of all condominium projects, whether newly constructed or

104. 210 Cal. App. 2d at 776-77, 26 Cal. Rptr. at 800.

105. *Id.* at 777, 26 Cal. Rptr. at 800.

106. *Id.*

107. *See, e.g., Pines*, 29 Cal. 3d at 662, 630 P.2d at 524, 175 Cal. Rptr. at 339.

108. 155 Cal. App. 2d 631, 637-38, 318 P.2d 561, 565 (1957).

109. 210 Cal. App. 2d at 775-76, 26 Cal. Rptr. at 799-800.

110. SANTA MONICA, CAL., MUN. CODE §§ 9300-9314 (1982).

converted, in the sum of \$1,000 per planned salable unit.¹¹¹ Section 6651 recited that the tax was "solely for revenue purposes."¹¹² Proceeds from the tax were deposited in the city's general fund.¹¹³

Section 6657 is the Condominium Tax Law's enforcement provision. In its original form it provided: "No permit for building, construction, demolition, grading, *subdividing*, condominium construction, condominium conversion, variance, conditional use or occupancy shall be granted unless the license provided for in this Chapter is obtained"¹¹⁴

In 1978, after the *Pines* trial court held that the Map Act preempted the Condominium Tax Law, but before the supreme court's reversal, Santa Monica amended section 6657 to eliminate its reference to subdividing.¹¹⁵ The present statute does not condition subdivision map approval upon payment of the tax, but the *Pines* decision affirms the city's right to do so.

V. ANALYSIS

A. Does the Map Act Preempt a Local Revenue-Raising Ordinance?

Plaintiffs in *Pines* contended that the Map Act effectively preempted the field which the Condominium Tax Law sought to regulate. The *Pines* court, with remarkably little attention to existing precedent, rejected this contention and redefined the focus of analysis of both the Map Act and the preemption issue.

Preemption analysis begins with the determination of whether a conflict exists between state and local law. As enunciated by the California Supreme Court in *Bishop v. City of San Jose*,¹¹⁶ the question is whether there is a "conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation"¹¹⁷ Only when the court finds a conflict or evidence of legislative intent to preempt the field does the preemption issue arise.

Legislative intent to preempt the field does not automatically de-

111. SANTA MONICA, CAL., MUN. CODE art. 6, ch. 6B, § 6651 (1973).

112. *Id.*

113. 29 Cal. 3d at 658-59, 630 P.2d at 521, 175 Cal. Rptr. at 336.

114. SANTA MONICA, CAL., MUN. CODE art. 6, ch. 6B, § 6657 (1973) (emphasis added).

115. 29 Cal. 3d at 659 n.1, 630 P.2d at 522 n.1, 175 Cal. Rptr. at 337 n.1. See SANTA MONICA, CAL., MUN. CODE art. 6, ch. 6B § 6657 (1978).

116. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

117. *Id.* at 62, 460 P.2d at 140, 81 Cal. Rptr. at 468. See also *City of Santa Clara v. Von Raesfeld*, 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970); *Century Plaza Hotel Co. v. City of Los Angeles*, 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970).

termine the outcome, however. If the court finds such a conflict or intent to preempt, "the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other."¹¹⁸ This requires the court to determine whether the subject of the conflicting state and local laws is a matter of statewide concern or a "municipal affair" within the meaning of article XI, section five of the California Constitution.¹¹⁹ If the court determines that it is a municipal affair, the local law prevails despite evidence of legislative intent to preempt.¹²⁰ If the matter is determined to be of statewide concern, however, legislative intent to preempt the field to the exclusion of municipal regulation will be determinative, and the local ordinance will be preempted by the state law at issue.¹²¹

The issue as framed by the *Pines* court was the first step in pre-

118. 1 Cal. 3d at 62, 460 P.2d at 140, 81 Cal. Rptr. at 468.

119. See *supra* note 103. CAL. CONST. art. XI § 5 provides:

(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

See, e.g., *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 291, 384 P.2d 158, 166-67, 32 Cal. Rptr. 830, 838-39 (1963); *Pipoly v. Benson*, 20 Cal. 2d 366, 369-70, 125 P.2d 482, 484-85 (1942); *Ex parte Braun*, 141 Cal. 204, 209, 74 P. 780, 782-83 (1903).

The law relating to preemption has undergone substantial change in recent years. Prior to *Bishop*, preemption had operated to permit the state to preempt a subject at will by adopting a scheme in an area where any statewide concern could be found. The term "municipal affairs" had little significance because virtually any state legislation in an area established sufficient interest to make the area one of statewide concern. See Comment, *The California Preemption Doctrine*, *supra* note 103, at 738-40 (discussing *Bishop v. City of San Jose*, 1 Cal. 3d at 66, 460 P.2d at 144, 81 Cal. Rptr. at 472 (Peters, J., dissenting)). *Bishop* introduced the requirement that a court balance the state's interest against the city's; a finding that the city's interest is greater results in the conclusion that the subject is a "municipal affair" and beyond interference by the state, even though the state law has attempted to deal with the subject on a statewide basis. 1 Cal. 3d at 62-63, 460 P.2d at 141, 81 Cal. Rptr. at 469. The result of this new emphasis on "municipal affairs" has been that the majority of current preemption cases involving charter cities revolve around the question of what constitutes a municipal affair. See also *Sato*, *supra* note 103.

120. [T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair.

Bishop v. City of San Jose, 1 Cal. 3d at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

121. 1 Cal. 3d at 61-62, 460 P.2d at 140, 81 Cal. Rptr. at 468. See also *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 315-16, 591 P.2d 1, 12, 152 Cal. Rptr. 903, 914 (1979).

emption analysis: whether state and local laws clash.¹²² Plaintiffs argued that a local ordinance unrelated to subdivision design and improvement that conditions map approval on payments for the benefit of the entire city, is inconsistent with the provisions of the Map Act.¹²³ They further argued, citing *Newport Building*, that the conflict occurs regardless of whether the local ordinance purports to be a subdivision regulation or a revenue raising measure.¹²⁴ The *Pines* court, however, rejected the premises on which *Newport Building* and *Kelber* were based, explaining that "*Kelber* and the cases following it contravene the principle that a tax for revenue is not invalid simply because it conditions the local exercise of a right or privilege articulated by the state."¹²⁵

Underlying this explanation is a sharp shift in the focus of Map Act analysis. The *Pines* court made it clear that henceforth the relevant question is not whether a local law materially changes the requirements for subdivision approval fixed by the legislature, but whether the local law is a subdivision regulation or a tax for revenue. If the former label applies, and the ordinance requires a fee unauthorized by the Map Act, it conflicts with the Act. But if the ordinance exacts a tax for revenue, it does not conflict even if its impact is identical to that of the forbidden regulation. The *Pines* formula appears to signal a clear return to the formalism rejected by earlier cases.¹²⁶

To marshal authority for its conclusion that the Condominium Tax Law imposed a tax for revenue that did not conflict with the Map Act, the *Pines* court was forced to search far afield of the Map Act itself; *Kelber* and its progeny, together with other cases which have construed the Map Act, obviously provided no support. The cases relied upon by the *Pines* court fall into three categories: (1) decisions finding no conflict between local business license taxes and state schemes for regulating the conduct of businesses and professions;¹²⁷ (2) a case upholding a local utility users' tax against claims that it conflicted with state laws governing utility regulation;¹²⁸ and (3) narrow

122. See *supra* notes 116-17 and accompanying text.

123. Respondents' Brief at 15-16, *The Pines v. City of Santa Monica*, 108 Cal. App. 3d 577, 166 Cal. Rptr. 649 (1980), *vacated*, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

124. *Id.* at 18-19.

125. 29 Cal. 3d at 660, 630 P.2d at 522-23, 175 Cal. Rptr. at 338.

126. See *supra* text accompanying note 109.

127. *In re Groves*, 54 Cal. 2d 154, 351 P.2d 1028, 4 Cal. Rptr. 844 (1960); *In re Galusha*, 184 Cal. 697, 195 P. 406 (1921); *Marsh & McLennan, Inc. v. City of Los Angeles*, 62 Cal. App. 3d 108, 132 Cal. Rptr. 796 (1976).

128. *Rivera v. City of Fresno*, 6 Cal. 3d 132, 490 P.2d 793, 98 Cal. Rptr. 281 (1971).

judicial constructions of state laws or constitutional provisions that proscribe local use of certain tax methods.¹²⁹

The rationale underlying the first category of cases, the business license decisions, is that "the imposition of an occupational tax by a municipality upon those engaged in [occupations the state has licensed] is not an interference with state affairs."¹³⁰ The court apparently concluded, albeit without explanation, that the Map Act is equivalent to a business licensing scheme and thus should be subject to the type of construction normally applied to such schemes. The court also assumed, again without analysis, that the Condominium Tax Law was a valid business license tax which Santa Monica, as a charter city, was constitutionally empowered to impose. As this note will explain,¹³¹ these assumptions are not well-founded.

The second and third categories of cases¹³² relied upon by the *Pines* court also provide little support for the court's finding of no conflict. In each case, the particular court scrutinized the applicable state statute for evidence of legislative intent to occupy the field to the exclusion of local legislation.¹³³ Finding no such evidence, these courts found no conflict. These decisions, however, as shall be explained,¹³⁴ cannot justify the *Pines* court's finding of no conflict because the *Pines* court did not examine the language and purposes of the Map Act.

1. Analogy of the Map Act to state business licensing schemes

The licensing and regulation of businesses and professions under California law is governed by several legislative enactments, including the Business and Professions Code,¹³⁵ the Health and Safety Code¹³⁶ and the Insurance Code.¹³⁷ Among the purposes ascribed to these licensing statutes is the protection of the public.¹³⁸ In keeping with this

129. *Weekes v. City of Oakland*, 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978); *A.B.C. Distrib. Co. v. City of San Francisco*, 15 Cal. 3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975); *Ainsworth v. Bryant*, 34 Cal. 2d 465, 211 P.2d 564 (1949).

130. *In re Galusha*, 184 Cal. 697, 699, 195 P. 406, 407 (1921).

131. See *infra* notes 156-89 and accompanying text.

132. See *supra* notes 128 & 129.

133. See *infra* notes 191-212 and accompanying text.

134. See *infra* notes 191-227 and accompanying text.

135. CAL. BUS. & PROF. CODE §§ 1-25761 (West 1964 & Supp. 1982).

136. CAL. HEALTH & SAFETY CODE §§ 1-53113 (West 1979 & Supp. 1982).

137. CAL. INS. CODE §§ 1-14099 (West 1972 & Supp. 1982).

138. For a discussion of the rationales underlying state licensing of occupations, see Moore, *The Purpose of Licensing*, 4 J. L. & ECON. 93 (1961). The author suggests three public welfare rationales: (1) uniform licensing procedures provide consumers with accurate information necessary to decision making; (2) society knows better than the individual what

purpose, a typical licensing chapter in the Business and Professions Code defines, among other things, the persons to be licensed, procedures for licensing, license fees, and disciplinary proceedings for violations of the chapter.¹³⁹

In *In re Galusha*,¹⁴⁰ which provided primary support for the court's holding in *Pines*, the supreme court addressed the issue whether the city of Los Angeles could impose an occupational tax upon attorneys licensed by the State Bar. The plaintiff in that case argued that local taxation of his profession interfered with the state's regulation of that profession and, therefore, was preempted by state law.¹⁴¹ The *Galusha* court rejected this contention, stating:

The municipality, in imposing an occupational tax upon attorneys, is not interfering with state regulations, for it is not attempting to prescribe qualifications for attorneys different from or additional to those prescribed by the state. It is merely providing for an increase in its revenue by imposing a tax upon those who, by pursuing their profession within its limits, are deriving benefits from the advantages especially afforded by the city.¹⁴²

Similarly, in *In re Groves*,¹⁴³ the supreme court upheld a city business license fee of \$100 per year imposed for revenue purposes on the operator of a milk processing plant despite the existence of state statutes regulating the licensing of his business.¹⁴⁴ Relying on the rationale of *In re Galusha*, the *Groves* court held that because the city license tax had no regulatory purpose and was strictly revenue-raising in character, it did not conflict with the state regulatory scheme.¹⁴⁵

Although the *Pines* court cited *Groves* and *Galusha*,¹⁴⁶ it failed to explain the applicability of their reasoning to *Pines*. In fact, the analogy is tenuous. The business of subdividing land is not a profession or business which is licensed by the state in the manner in which the state licenses the practice of law or the manufacture of milk products.

is good for the individual; and (3) society cannot afford to condone low standards of business and professional conduct by tolerating them. *Id.* at 103.

139. See, e.g., CAL. BUS. & PROF. CODE div. 9 (alcoholic beverages), div. 3, ch. 9 (contractors).

140. 184 Cal. 697, 195 P. 406 (1921).

141. *Id.* at 698, 195 P. at 406.

142. *Id.* at 699, 195 P. at 407.

143. 54 Cal. 2d 154, 351 P.2d 1028, 4 Cal. Rptr. 844 (1960).

144. *Id.* at 156-58, 351 P.2d at 1030-31, 4 Cal. Rptr. at 846-47.

145. *Id.* at 157-58, 351 P.2d at 1031, 4 Cal. Rptr. at 847.

146. 29 Cal. 3d at 660-61, 630 P.2d at 523, 175 Cal. Rptr. at 338.

The general rule governing the relationship between state regulation and local taxation is that "[a] particular matter may be a state affair and exclusively subject to state regulation but yet not immune from local taxation for revenue purposes where the tax does not interfere with the field preempted by the state."¹⁴⁷ As applied to state regulation of businesses or occupations, the rule has been construed to mean that a local occupational tax does not interfere with state regulation of the business because it does not "prescribe qualifications . . . different from or additional to those prescribed by the state."¹⁴⁸ The state's interest in regulating businesses and professions extends only to assuring that certain standards are met, which it does by means of licensing and disciplinary procedures. The state has little interest in protecting its licensed businesses and professions from municipal taxation.¹⁴⁹

The state interest underlying the Map Act is distinguishable, however, from that underlying the regulation of businesses and professions. The Map Act does not purport to regulate the conduct of subdividers, as, for instance, the Real Estate Law¹⁵⁰ regulates the conduct of real estate developers and brokers. The Map Act was not designed to protect the public against ill-trained or unscrupulous subdividers; it establishes no licensing procedures, license fees or disciplinary proceedings for subdividers.

The purpose of the Map Act is to create and define the balance of authority between state and local regulation of subdivisions.¹⁵¹ That authority originates in the state's police power.¹⁵² By virtue of the Map Act, the state delegates certain authority to local governments—but only the authority to regulate subdivision design and improvement;¹⁵³ it does not authorize cities to ban subdivision development entirely or

147. *Ainsworth v. Bryant*, 34 Cal. 2d 465, 477, 211 P.2d 564, 571 (1949).

148. *In re Galusha*, 184 Cal. at 699, 195 P. at 407.

149. For example, no such interest is expressed in the provisions of the Business & Professions Code that establish licensing procedures for attorneys. See CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1974 & Supp. 1982).

150. The conduct of real estate developers and brokers is governed by CAL. BUS. & PROF. CODE §§ 10000-10602 [hereinafter cited as the Real Estate Law]. It should be noted that before the reenactment of the Map Act in Title 7 (Planning and Land Use) of the Government Code in 1974, it was codified in the Real Estate Division of the Business & Professions Code. The Real Estate Division consists of two sections: "Licensing of Persons" (§§ 10000-10602) and "Regulation of Transactions" (§§ 11000-11709), which included the Map Act. Thus, even when it was contained within the Business and Professions Code, the Map Act was not considered a business licensing statute.

151. See *supra* text accompanying notes 13-16.

152. See generally Anderson, *supra* note 8, at § 7.01; Note, *Subdivision Exactions in California*, *supra* note 86.

153. See *supra* notes 62-79 and accompanying text.

to condition subdivision map approval on payment of fees unrelated to needs generated by the subdivision.¹⁵⁴ The Map Act narrowly defines the burdens a local government may impose on the process of subdivision by specifying the types of payment the city may require as prerequisites to map approval.¹⁵⁵

The state's interest in creating and maintaining a balance of authority between state and local interests is thus of a different character from its interest in regulating businesses and professions. The state arguably has a strong interest in protecting subdividers from local taxation because local taxation places a burden on subdividing unauthorized by the Map Act. Accordingly, judicial determinations that local taxes do not interfere with state schemes for regulating the conduct of businesses and professions do not provide a reasonable basis for concluding that the Condominium Tax Law does not interfere with the Map Act. The existence or nonexistence of a conflict can be discovered only with reference to the Act itself.

2. The Condominium Tax Law: Tax for revenue or subdivision regulation?

Even if the Map Act were sufficiently analogous to state licensing schemes to support the conclusion that a local tax found not to conflict with such a state scheme would also not conflict with the Map Act, the *Pines* court did not convincingly demonstrate that the Condominium Tax Law imposed a legitimate business license tax rather than a subdivision regulation masquerading as a tax. This distinction is critical because, unlike the power of a city to regulate state-regulated businesses, "the city's right to tax the privilege of employment is virtually beyond dispute"¹⁵⁶

The traditional distinction between a license fee imposed under the police power for regulatory purposes and a tax imposed under the tax power is well understood.¹⁵⁷ A regulatory license fee is intended to finance the enforcement of regulation, and does not exceed the necessary expense of issuing the license and regulating the business it cov-

154. *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 638, 318 P.2d 561, 566 (1957). *Kelber* was disapproved in *Pines* only to the extent that it implies limitations on local tax power, not to the extent that it limits local power to regulate subdivisions. 29 Cal. 3d at 664, 630 P.2d at 525, 175 Cal. Rptr. at 341.

155. See *supra* notes 71-76.

156. *Weekes v. City of Oakland*, 21 Cal. 3d 386, 396, 579 P.2d 449, 454, 146 Cal. Rptr. 558, 563 (1978).

157. 9 E. McQUILLAN, MUNICIPAL CORPORATIONS § 26.15 (3d ed. 1978).

ers.¹⁵⁸ A tax, on the other hand, is imposed solely for revenue purposes and has no regulatory features.¹⁵⁹ The name an exaction bears is immaterial in determining whether it is a fee or a tax; its substantive provisions determine its character.¹⁶⁰

The Condominium Tax Law was carefully drafted to bear all the indicia of a tax measure: (1) it was designated a revenue-raising measure; (2) it contained no obvious regulatory provisions; and (3) the revenue it generated was placed in the general revenue fund.¹⁶¹ Yet the Condominium Tax had two regulatory features that distinguish it from the local taxes upheld in the cases cited in *Pines*, and also from business license taxes in general.

First, as a one-time, per-unit fee, the Condominium Tax Law was not as clearly imposed on the privilege of doing work in the jurisdiction as were the ongoing business taxes under scrutiny in the cases relied upon in *Pines*. *In re Galusha*¹⁶² involved an annual tax on the practice of law, *In re Groves*¹⁶³ an annual tax on the business of operating a milk products plant, and *Marsh & McLennan, Inc. v. City of Los Angeles*¹⁶⁴ an annual tax on the commission revenues of insurers. Because these taxes are measured by ongoing business activity, they appear to tax the business done in the jurisdiction. The Condominium Tax, on the other hand, is a flat charge on each unit.¹⁶⁵ This gives it the appearance of a subdivision fee, which is often levied on a per-unit or per-lot basis.¹⁶⁶

This is not to say, of course, that an occupation or business tax cannot be imposed on the business of constructing homes. In *City of Los Angeles v. Rancho Homes, Inc.*,¹⁶⁷ the supreme court held that a

158. *Id.*

159. *Id.*

160. *Ainsworth v. Bryant*, 34 Cal. 2d 465, 211 P.2d 564 (1949).

161. See McQUILLAN, *supra* note 157, at § 26.16.

162. 184 Cal. 697, 195 P. 406 (1921).

163. 54 Cal. 2d 154, 351 P.2d 1028, 4 Cal. Rptr. 844 (1960).

164. 62 Cal. App. 3d 108, 132 Cal. Rptr. 796 (1976).

165. 29 Cal. 3d at 658, 630 P.2d at 521, 175 Cal. Rptr. at 336.

166. See, e.g., *Santa Clara County Contractors Ass'n v. City of Santa Clara*, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965) (\$25 for each dwelling unit); *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (\$30 per lot). That Santa Monica itself recognized the similarity of the Condominium Tax Law to a subdivision regulation is indicated by the city's alternative argument to the trial court: that the Condominium Tax Law was a "permissible subdivision exaction" which was "essential for effective implementation of the state regulatory scheme." Respondents' Brief at 5, *The Pines v. City of Santa Monica*, 108 Cal. App. 3d 577, 166 Cal. Rptr. 649 (1980), *vacated*, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

167. 40 Cal. 2d 764, 256 P.2d 305 (1953).

city's business license tax ordinance, which imposed an annual gross receipts tax on all businesses, trades and professions, was applicable to a plaintiff engaged in the development and sale of real property. The tax in *Rancho Homes*, however, was clearly recognizable as a business tax because gross receipts are widely used as the measure of business and occupation taxes.¹⁶⁸

Two California court of appeal decisions lend support to the *Pines* court's assumption that the Condominium Tax Law, although imposed as a one-time, one-payment fee, was a legitimate business tax. In *Associated Home Builders, Inc. v. City of Newark*,¹⁶⁹ the court of appeal upheld a tax on the business of constructing residential units measured by the number of bedrooms in each dwelling. The city required the tax to be paid as a prerequisite to issuance of a building permit for the unit. The court held that the tax was not an attempt to regulate the issuance of building permits, but was a valid business license tax.¹⁷⁰

*Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*¹⁷¹ involved a similar business tax. In that case, the court of appeal upheld the business tax despite an admittedly regulatory purpose: the city imposed an "environmental excise tax," measurable at the rate of \$500 per bedroom, on the construction of new dwellings.¹⁷² The purpose of the tax was to offset the damage to the ecology and environment of the city occasioned by a local boom in housing construction.¹⁷³ The city's ordinances also established a business license tax, but imposed it only on those developers who had not paid the environmental excise tax. This enabled the court to conclude that the environmental excise tax was, effectively, a business license tax.¹⁷⁴ While acknowledging that the environmental excise tax had an underlying regulatory purpose, viz., to aid the city in coping with the environmental problems occasioned by major development projects,¹⁷⁵ the court nevertheless held that the tax was not a regulatory scheme because the *declared purpose* of the tax was "strictly that of raising revenue."¹⁷⁶

The supreme court in *Pines* could have extended the reasoning of

168. *Weekes v. City of Oakland*, 21 Cal. 3d 386, 394, 579 P.2d 449, 453, 146 Cal. Rptr. 558, 562 (1978) ("The gross receipts occupation tax has a venerable history as a revenue-raising measure for California cities.").

169. 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971).

170. *Id.* at 111, 95 Cal. Rptr. at 650.

171. 73 Cal. App. 3d 486, 141 Cal. Rptr. 36 (1977).

172. *Id.* at 491 n.2, 141 Cal. Rptr. at 39 n.2.

173. *Id.*

174. *Id.* at 492, 141 Cal. Rptr. at 40.

175. *Id.* at 497, 141 Cal. Rptr. at 44.

176. *Id.*

these bedroom tax decisions to support a conclusion that the one-time tax imposed on each *unit* by the Condominium Tax Law did not operate as a regulation. This is particularly so because the Condominium Tax Law, unlike the tax upheld in *Westfield-Palos Verdes*, had no avowedly regulatory purpose. The court did not rely on these cases, however. Instead, the court by analogy appears to have implicitly extended the definition of a valid business license tax on development and construction to businesses completely unrelated to development and construction.

The Condominium Tax Law's other regulatory feature is the conditioning of subdivision approval on payment of the tax. This is, of course, the feature that led the court of appeal in *Newport Building* to ignore the usual distinction between a regulation and a tax for revenue in the context of the Map Act.¹⁷⁷ In *Pines*, the supreme court held that the conditioning feature was not regulatory in nature, but merely a means of revenue enforcement: "The power to tax includes power to prescribe reasonable means of enforcement."¹⁷⁸ By a somewhat strained analogy, the court equated the conditioning aspect of the Condominium Tax Law with the requirement that a business that is taxed by the city must obtain a registration certificate;¹⁷⁹ or that a retailer "collect" a retail sales tax from his customers;¹⁸⁰ or that a contractor display a sticker on his automobile as evidence that he had paid a local business tax.¹⁸¹

The *Pines* court's comparisons ignored the specific requirements of the Map Act. Local power to condition map approval is at the heart of the Map Act, as are the restrictions of that power to certain limited circumstances.¹⁸² The court's dismissal of the Condominium Tax Law's conditioning feature, by analogy to an automobile sticker requirement, also overlooked the *regulatory effect* of the requirement: construction of the project cannot proceed until the tax is paid.

The court need not have relied on such unlikely analogies. The same decisions that would have supported the court's implicit conclusion that a tax payable as a one-time, lump-sum charge against the property is a legitimate business tax would also have strengthened the

177. See *supra* text accompanying notes 98-109.

178. 29 Cal. 3d at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339 (citations omitted).

179. City of Los Angeles v. A.E.C. Los Angeles, 33 Cal. App. 3d 933, 940, 109 Cal. Rptr. 519, 524 (1973).

180. Ainsworth v. Bryant, 34 Cal. 2d 465, 211 P.2d 564 (1949).

181. Arnke v. City of Berkeley, 185 Cal. App. 2d 842, 848-49, 8 Cal. Rptr. 645, 648-49 (1960).

182. See *supra* notes 63-79 and accompanying text.

court's treatment of the conditioning requirement. In *Associated Home Builders, Inc. v. City of Newark*,¹⁸³ the court of appeal rejected an assertion that conditioning the issuance of a building permit upon payment of the city's construction tax conflicted with the state Health and Safety Code's limitation of building permit fees to those which cover the costs of issuing permits.¹⁸⁴ Like the *Pines* court, the court in *Associated Home Builders* designated the payment a tax, not a regulatory fee, and observed that the requirement that the tax be paid before the building permit was issued "represents merely a choice of a reasonable time for payment of a tax validly imposed."¹⁸⁵

In *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*,¹⁸⁶ the court of appeal reached the same conclusion with regard to the environmental excise/business license tax at issue in that case.¹⁸⁷ The court stated that "the requirement that the excise tax be paid before occupancy is permitted, while regulatory in character, is imposed simply as a means of enforcement of the tax, and does not alter the overall character as a revenue measure."¹⁸⁸

The courts' analyses in *Associated Home Builders* and *Westfield Palos Verdes* were similar in one respect to that of the supreme court in *Pines*: they overlooked the regulatory effect of conditioning permission to engage in a taxed business. This effect, however, is particularly significant in *Pines* because of the interaction of the local law with the Map Act and its many directives regarding the conditioning of map approval. The legislature's clearly voiced intention that map approval be conditioned only in certain limited circumstances underscores the weakness of the *Pines* court's conclusion that, in conditioning map approval upon payment of the tax, the city was merely prescribing a reasonable means of collecting the tax.¹⁸⁹

The original observation that requiring a contractor to display an automobile sticker is merely a means of revenue enforcement¹⁹⁰ grew, through *Pines*, into a powerful rule that threatens to impair the purposes of the Map Act. The court's failure to explain adequately why the Condominium Tax Law should not be viewed as a subdivision reg-

183. 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971).

184. *Id.* at 110, 95 Cal. Rptr. at 649-50.

185. *Id.* at 111, 95 Cal. Rptr. at 650.

186. 73 Cal. App. 3d 486, 141 Cal. Rptr. 36 (1977).

187. See *supra* notes 171-76 and accompanying text.

188. 73 Cal. App. 3d at 497, 141 Cal. Rptr. at 44 (citing *Arnke v. City of Berkeley*, 185 Cal. App. 2d 842, 8 Cal. Rptr. 645 (1960)).

189. See *supra* notes 63-79 and accompanying text.

190. See *supra* text accompanying note 181.

ulation, but rather as a valid business license tax, detracts from the persuasiveness of its conclusion that the tax did not conflict with the Map Act. It emphasizes the need to examine the requirements of the Map Act itself.

3. The requirements of the Map Act

To determine whether a municipal ordinance conflicts with state law, a court must examine the state law for evidence of intent to occupy the field to the exclusion of local legislation.¹⁹¹ This process requires analysis of the statute's language, its legislative history, and the cases construing it.¹⁹² The *Pines* court considered and rejected previous judicial constructions of the Map Act's intent (the "*Kelber* doctrine"),¹⁹³ and also considered and rejected the argument that the Map Act's legislative history supports a conclusion that the legislature intended the Act to occupy the field of subdivision approval except on issues of design and improvement.¹⁹⁴ The *Pines* court did not, however, examine

191. *Bishop v. City of San Jose*, 1 Cal. 3d at 62, 460 P.2d at 140, 81 Cal. Rptr. at 468.

192. *Bishop* addressed the issue whether the legislature intended California's prevailing wage laws to control the setting of city employees' salaries. The court first examined the language of the wage statute and concluded that it was intended to apply only to privately contracted public work. 1 Cal. 3d at 64, 460 P.2d at 142, 81 Cal. Rptr. at 470. The court found further support for its position in the history of the statute and in an earlier judicial interpretation of the statute's language. *Id.* at 64-65, 460 P.2d at 142-43, 81 Cal. Rptr. at 470-71; see also *A.B.C. Distrib. Co. v. City and County of San Francisco*, 15 Cal. 3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975); *Ainsworth v. Bryant*, 34 Cal. 2d 465, 211 P.2d 564 (1949); *Marsh & McLennan, Inc. v. City of Los Angeles*, 62 Cal. App. 3d 108, 132 Cal. Rptr. 796 (1976).

193. See *supra* notes 87-109 and accompanying text.

194. It is not entirely clear why the court rejected this argument. The relevant history can be summarized as follows:

In 1971 and 1972, the legislature considered and rejected two proposed bills (S. 1118, Reg. Sess. (1972); A. 1374, Reg. Sess. (1971)), which, if passed, would have restricted the authority of state government under the Map Act. Both bills would have amended what is now CAL. GOV'T CODE § 66411 to provide as follows:

The Legislature declares that in enacting this chapter it intends to regulate only those matters in which statewide uniformity is needed, as provided herein, in order that local agencies may exercise the maximum degree of control over divisions of real property within their respective jurisdictions and to insure that land development is in accordance with local planning policy.

Section 66411 is the Map Act section that vests power in local governments to regulate subdivision design and improvement. No language limiting state power appears in § 66411 in its present form.

As the supreme court noted in *Pines*, the proposed changes were only parts of bills seeking to recodify the Map Act—an effort finally successful in 1974, with the Act's recodification in the Government Code. 29 Cal. 3d at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339. From this, the court concluded that the failure to adopt the amendments did not indicate intent on the part of the legislature to limit local tax power. *Id.* Nevertheless, the proposed textual changes represented significant policy changes the legislature could hardly have

the terms of the Map Act itself. Its failure to do so distinguishes *Pines* from the four decisions cited by the court for the proposition that "California courts also have been ready in other contexts to uphold local taxes against arguments that they conflict with state regulation."¹⁹⁵ In all four decisions, the courts were able to conclude that no conflict existed only after analyzing the language and purpose of the state law.

In *Weekes v. City of Oakland*,¹⁹⁶ the supreme court was called upon to decide whether the city of Oakland could properly levy a tax on wages earned within the city by nonresidents employed in the city.¹⁹⁷ The plaintiffs in *Weekes* contended that the tax was a municipal income tax barred by the Revenue and Taxation Code.¹⁹⁸ The *Weekes* court distinguished Oakland's tax from income taxes that had run afoul of the state prohibition, likening it instead to a gross receipts business license tax. This characterization enabled the court to conclude that there was no conflict because the Revenue and Taxation

overlooked. Furthermore, the recodified Map Act does not contain the changes proposed in 1971 and 1972.

Plaintiffs further argued that because *Kelber, Newport Bldg.*, and their progeny were decided before the Map Act's revision and reenactment in the Government Code in 1974, and because the Map Act was not materially changed at that time, the legislature intended to ratify the *Kelber* doctrine. *Id.* at 662, 630 P.2d at 523-24, 175 Cal. Rptr. at 339. They invoked the following canon of interpretation:

Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions. . . . Moreover, failure to make changes in a given statute in a particular respect when the subject is before the Legislature and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect.

Bishop v. City of San Jose, 1 Cal. 3d at 65, 460 P.2d at 143, 81 Cal. Rptr. at 471 (citations omitted).

The *Pines* court found this doctrine inapplicable in that case because [t]he Map Act's words do not deal with local taxes, and there is no evidence that the matter was before the Legislature in 1974. . . . We should not infer that, because the Legislature when it reenacted a comprehensive statute failed to address this specific topic, it intended to preempt local subdivision taxes.

29 Cal. 3d at 662, 630 P.2d at 524, 175 Cal. Rptr. at 339 (citations omitted).

Although the subject of local taxes was not "before the Legislature" in 1974, *Kelber* and *Newport Building* had served as important limitations on local power to condition subdivision map approval since 1957 and 1962, respectively. *Newport Bldg.* did, in fact, limit local tax power. The canon suggests that these decisions were before the legislature in 1974. Although it would be unwise to conclude, from the legislative history of the Map Act alone, that the legislature intended the *Kelber/Newport Bldg.* construction to stand, that history provides more convincing evidence of such intent than the *Pines* court was willing to recognize.

195. 29 Cal. App. 3d at 661, 630 P.2d at 523, 175 Cal. Rptr. at 338.

196. 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978).

197. *Id.* at 390, 579 P.2d at 450, 146 Cal. Rptr. at 559.

198. *Id.* Revenue & Taxation Code § 17041.5 prohibits the imposition of income taxes by any local government. CAL. REV. & TAX. CODE § 17041.5 (West 1970).

Code specifically exempted from the income tax prohibition business license taxes measured by gross receipts.¹⁹⁹ The court found that, far from being in conflict with the state law, Oakland's tax was "expressly authorized" by the state law.²⁰⁰

The supreme court used similar reasoning in *Rivera v. City of Fresno*²⁰¹ to uphold a users' tax levied by the city of Fresno on all those who used gas, electricity, and telephone services in the city. Plaintiffs claimed that the local tax conflicted with the requirements of the state uniform local sales and use tax law, the Bradley-Burns Act,²⁰² by requiring a tax in addition to that authorized by the state law.²⁰³ However, the Bradley-Burns Act contains a loophole provision specifying that it is not intended to prohibit the local levying of any tax "substantially different" from those authorized by the Act.²⁰⁴ The *Rivera* court determined that Fresno's utility users' tax was "substantially different" because the state scheme was intended to require uniform local sales taxes on personal property, not utility services.²⁰⁵ As a "substantially different tax," the utility users' tax was not in conflict with the state regulatory scheme.²⁰⁶

In *Ainsworth v. Bryant*,²⁰⁷ the state law in question was article XX, section 22 of the California Constitution, which conferred upon the state legislature exclusive power to license and regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages within the state.²⁰⁸ Plaintiff, a retail liquor dealer, maintained that this constitutional delegation of power precluded the city of San Francisco from enforcing a local retail sales tax against him.²⁰⁹ A thorough analysis of the language of article XX, section 22 and its legislative history convinced the supreme court that the two laws did not conflict: the constitutional language empowered the state only to collect license fees or occupation taxes. The court stated: "In thus delineating and limiting the specific, exclusive taxing power of the state . . . , it would appear . . . that no further exclusive power of taxation was

199. 21 Cal. 3d at 390, 579 P.2d at 450, 146 Cal. Rptr. at 559.

200. *Id.* at 391, 579 P.2d at 451, 146 Cal. Rptr. at 560.

201. 6 Cal. 3d 132, 490 P.2d 793, 98 Cal. Rptr. 281 (1971).

202. CAL. REV. & TAX. CODE §§ 7200-7212 (West 1974 & Supp. 1981).

203. 6 Cal. 3d at 137, 490 P.2d at 795-96, 98 Cal. Rptr. at 283-84.

204. *Id.*

205. *Id.* at 137-38, 490 P.2d at 796, 98 Cal. Rptr. at 284.

206. *Id.*

207. 34 Cal. 2d 465, 211 P.2d 564 (1949).

208. *Id.* at 468, 211 P.2d at 565.

209. *Id.*

intended."²¹⁰

Similarly, in *A.B.C. Distributing Co. v. City of San Francisco*,²¹¹ the court employed the same reasoning to uphold the application of a local payroll tax to wholesale liquor distributors. Because the tax in question was not an occupation tax on liquor dealers, but a tax applied to all businesses with employees who performed services in the city and county, it did not conflict with the regulatory provisions of article XX, section 22.²¹²

Ainsworth and *A.B.C. Distributing Co.* illustrate the kind of analysis required to determine whether a local ordinance conflicts with a state law. Although *Weekes*²¹³ and *Rivera*²¹⁴ involve construction of loophole provisions, they also reflect concern for the requirements of the state law with which the local law in question is alleged to clash. The *Pines* court, in contrast, virtually ignored the provisions of the Map Act. At only one point in the *Pines* opinion did the court address the language of the Act, and then only to observe that "[t]he Map Act contains no language granting or limiting local tax power."²¹⁵ While this is true, it begs the question raised by *Kelber* and the cases following it: to what extent does the Map Act restrict local power to burden the subdivision of land by *any means*?

Because the Map Act contains no language granting or limiting local tax power, the *Pines* court could find no evidence of legislative intent to limit local tax power. The court stated: "Because the tax power is so fundamental, state intent to preempt it must be clear."²¹⁶ The *Pines* court explicitly rejected the *Kelber/Newport Building* determination that the Map Act *was* intended to limit local tax power.²¹⁷ It also rejected the confirmation of such an intent arguably present in the Map Act's legislative history.²¹⁸ This reasoning suggests that only an express statement of legislative intent to limit local tax power would have persuaded the *Pines* court that the Map Act was intended to preempt local ordinances like the Condominium Tax Law, and that, therefore, the two laws conflict.

California decisions, however, have rejected the notion that pre-

210. *Id.* at 473, 211 P.2d at 568.

211. 15 Cal. 3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975).

212. *Id.* at 572, 542 P.2d at 628, 125 Cal. Rptr. at 468.

213. *See supra* notes 196-200 and accompanying text.

214. *See supra* notes 201-06 and accompanying text.

215. 29 Cal. 3d at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

216. *Id.* at 662, 630 P.2d at 524, 175 Cal. Rptr. at 339.

217. *Id.* at 664, 630 P.2d at 525, 175 Cal. Rptr. at 341.

218. *See supra* note 194.

emption depends upon a strict conflict between the wording of a local ordinance and a state legislative enactment. The general rule was stated by the supreme court in *Tolman v. Underhill*.²¹⁹ "Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme."²²⁰

Had the *Pines* court analyzed the language and purpose of the Map Act, it would have been forced to confront the issues raised in *Kelber* and *Newport Building*. The Map Act vests authority to control subdivision design and improvement in local government.²²¹ Beyond that, it lists specific situations in which local government may condition map approval.²²² The supreme court has held that, although power to condition map approval in additional circumstances may be implied from the Act,²²³ the conditions must be consistent with the Act and must be reasonably related to needs created by the subdivision.²²⁴ Every grant of authority to condition map approval on payment of a fee is restricted to assure that the fee is reasonably required because of needs created by the subdivision, and that it is used either to benefit the subdivision or to remedy problems created by the subdivision.²²⁵ The Map Act's repeated emphasis on these requirements led the *Kelber* court to conclude that conditioning map approval on payments to benefit the entire city "would directly impede the realization of what appears to be the intent and meaning of the act."²²⁶ The court in *Newport Building* took this line of reasoning one step further and concluded that such conditions conflicted with the Map Act, regardless of whether they were denominated a fee or a tax.²²⁷ The Condominium Tax Law conditioned map approval in a manner unauthorized by the Map Act. Therefore, it would appear to be in conflict with the Act.

It is possible, on the other hand, that a thorough reading of the Map Act would not have led to this result. As Justice Marshall observed in his concurring opinion, a local tax will be preempted by a state statute or scheme only if the two enactments are in "direct and

219. 39 Cal. 2d 708, 249 P.2d 280 (1952).

220. *Id.* at 712, 249 P.2d at 283.

221. CAL. GOV'T CODE § 66411 (West Supp. 1982).

222. *See supra* notes 63-76 and accompanying text.

223. *Ayres v. City Council of Los Angeles*, 34 Cal. 2d at 37, 207 P.2d at 5.

224. *Id.*

225. *See supra* note 76.

226. *Kelber v. City of Upland*, 155 Cal. App. 2d at 638, 318 P.2d at 566.

227. *See supra* text accompanying note 109.

immediate conflict.'"²²⁸ Re-examination of the Map Act in light of this requirement might have prompted the court to conclude that there was insufficient evidence of conflict to meet the test. A careful analysis of the Map Act, coupled with an explanation of the reasons why the cases construing it to date have been erroneous, would have been more acceptable, even to the critic of such a decision, than the unsatisfying formalism of the *Pines* opinion.

B. Impact of Proposition 13 on the Condominium Tax Law

The drafters of Proposition 13,²²⁹ apparently anticipating that local governments might attempt to offset the shortfall in local property tax revenues occasioned by the initiative's passage, also included in Proposition 13 the requirement that any "special taxes" imposed by cities, counties and "special districts" be approved by a two-thirds vote of the local electorate. This proposal is embodied in article XIII A, section four of the California Constitution.²³⁰

The Condominium Tax Law was enacted prior to the passage of Proposition 13, and plaintiffs in *Pines* did not argue that the ordinance was subject to the two-thirds approval requirement of section four.²³¹ Certain local taxes imposed in the wake of the *Pines* decision may, however, be subject to that requirement. Thus, it is important to determine whether taxes like the Condominium Tax Law are "special taxes" within the meaning of section four.

The California Supreme Court construed Proposition 13 for the first time in *Amador Valley Joint Union High School District v. State Board of Equalization*.²³² In *Amador*, the court upheld the constitutionality of the amendment on its face, but noted that its language "in a number of particulars is imprecise and ambiguous" and that it "neces-

228. 29 Cal. 3d at 665, 630 P.2d at 525, 175 Cal. Rptr. at 340 (Marshall, J., concurring) (quoting *Weekes v. City of Oakland*, 21 Cal. 3d 386, 392, 579 P.2d 449, 452, 146 Cal. Rptr. 558, 561 (1978)). Justice Marshall acknowledged that because of "the legislature's statutory promulgation of rules for the governance of condominium construction [referring to the Map Act], we must conclude that the legislature plainly expects that condominiums will be built and only constrains such building in the manner prescribed by the statute." Therefore, he concluded, a conflict between the Condominium Tax Law and the Map Act "may be inferred." 29 Cal. 3d at 664-65, 630 P.2d at 525, 175 Cal. Rptr. at 340.

229. See *supra* note 2.

230. CAL. CONST. art. XIII A § 4 provides as follows:

Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

231. Art. XIII A contains no language indicating intended retroactivity.

232. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

sarily and over a period of time will require judicial, legislative, and administrative construction.”²³³ The court did not define the terms “special tax” or “special district.”²³⁴

Efforts by the courts of appeal to define the special tax permitted by section four were hampered by the tendency of courts, legislators, and scholars to use the term “special tax” somewhat indiscriminately to refer both to taxes in general and to special assessments. Special assessments are levies earmarked for particular purposes that specially benefit the property against which they are assessed.²³⁵ Furthermore, even before the passage of Proposition 13, the term “special tax” lacked consistent definition.²³⁶ One commentator identified seven separate contexts in which a tax had been described as “special.”²³⁷ The traditional distinction between a “general” and a “special” tax has been that the former is deposited in a general fund, whereas the latter is marked for a special purpose.²³⁸

In view of the absence of a settled definition, the supreme court in *Amador* left the lower courts with the admonition that they were to interpret section four with primary reference to the intent of the drafters and the electorate.²³⁹ The courts of appeal followed this instruction, agreeing that the intent of the electorate in enacting Proposition 13 was to provide effective property tax relief.²⁴⁰ They also agreed that section four was “aimed at limiting local governments’ ability to replace funds

233. *Id.* at 244-45, 583 P.2d at 1299, 149 Cal. Rptr. at 257.

234. In *Los Angeles County Transp. Comm’n v. Richmond*, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982), the California Supreme Court considered the meaning of the term “special district,” as used in section four. The court concluded that “special districts” that are not empowered to levy a property tax, such as the Los Angeles County Transportation Commission, are not affected by section four and may enact special taxes with the approval of a simple majority of the local voters. *Id.* at 201, 643 P.2d at 943, 182 Cal. Rptr. at 326.

235. 14 McQUILLAN, *supra* note 157, at § 38.01.

236. *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 983, 156 Cal. Rptr. 777, 782 (1979).

237. Naumann, *supra* note 3, at 812-17. The seven contexts are: (1) special assessments lodged against property; (2) any contributions to government (not necessarily property-related) which are applied to a specific purpose that especially benefits a particular taxpayer; (3) taxes collected from the population at large to benefit the population at large, but for specific purposes; (4) taxes imposed on a limited number or particular class of taxpayers, but for general purposes; (5) a one-time, non-recurring bedroom tax; (6) the State’s Bank and Gross Premiums Insurers’ taxes; and (7) special assessments that are illegal because the amount of the assessment does not correspond to the benefit received by the property.

238. *County of Fresno v. Malmstrom*, 94 Cal. App. 3d at 983, 156 Cal. Rptr. at 782-83 (citing *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 99-100, 308 P.2d 1, 4 (1957)).

239. 22 Cal. 3d at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 258. *But see supra* note 234.

240. *See, e.g., Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 322-23, 170 Cal. Rptr. 685, 688 (1981); *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 980, 156 Cal. Rptr. 777, 780 (1979).

reduced by other sections of [Proposition 13] by shifting to other types of taxes."²⁴¹ Awareness of this purpose caused the court of appeal in *County of Fresno v. Malmstrom* to conclude that a county's special assessment for street construction levied against property owners in a county subdivision was not a "special tax" within the meaning of section four.²⁴² Examination of the ballot arguments supporting Proposition 13 influenced the court's conclusion that the initiative was "aimed at *general* taxes and governmental spending."²⁴³

The California Supreme Court ended the speculation about the meaning of the term "special tax" in *City and County of San Francisco v. Farrell*.²⁴⁴ In *Farrell*, the court analyzed a city business tax to determine whether it fell within the ambit of section four. The tax in question was a "payroll expense tax" that had been enacted prior to the passage of Proposition 13. In 1979, one year after the passage of Proposition 13, city supervisors passed an ordinance temporarily raising the payroll expense tax from 1.1 percent to 1.5 percent to avert a general city deficit. At the end of the temporary period, 55 percent of the voters approved an indefinite extension of the rate increase.²⁴⁵ When the city thereafter sought to appropriate funds to repair elevators in a city hospital, the city and county comptroller refused to certify the availability of funds, claiming that the increase in the tax rate was illegal because it was a special tax requiring two-thirds voter approval.²⁴⁶ Although the tax was clearly not a "special tax" in any of the traditional senses of the term,²⁴⁷ the comptroller asserted that it was the type of tax the electorate intended to forestall by means of section four. The comptroller quoted the supreme court's language in *Amador*:

[S]ince any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes. Although sections 3 and 4 do not pertain solely to the matter of *property* taxation, both sections, in

241. *County of Fresno v. Malmstrom*, 94 Cal. App. 3d at 983, 156 Cal. Rptr. at 782; *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d at 324-25, 170 Cal. Rptr. at 689.

242. 94 Cal. App. 3d at 982, 156 Cal. Rptr. at 782.

243. *Id.* at 981, 156 Cal. Rptr. at 781. Other decisions by the courts of appeal endeavoring to construe section four with reference to the intent of the voters included *Mills v. County of Trinity*, 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980), and *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981).

244. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).

245. *Id.* at 51, 648 P.2d at 937, 184 Cal. Rptr. at 715.

246. *Id.*

247. See *supra* note 237 and accompanying text.

combination with sections 1 and 2, are reasonably germane, and functionally related, to the general subject of property tax relief.²⁴⁸

The comptroller urged that this language meant that the phrase "special taxes" should be read to mean "'new,' 'additional,' or 'supplemental' taxes which are enacted to replace tax revenue lost as a result of Proposition 13's limitations on the property tax."²⁴⁹

The *Farrell* court admitted that the language could be so interpreted, but rejected the construction because it would "read the word 'special' out of the phrase 'special taxes,' in violation of settled rules of construction."²⁵⁰ The court summarized its holding as follows: "[W]e construe the term 'special taxes' in section 4 to mean taxes which are levied for a specific purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes."²⁵¹

In dissent, Justice Kaus criticized the anomalous result of the *Farrell* holding:

As construed by the majority, section 4 places no limit whatsoever on the ability of local entities to levy the traditional, run-of-the-mill revenue-raising taxes for general municipal purposes, but—quite perversely—only makes it more difficult for such entities to levy much more unusual and more limited "special purpose" taxes. Since I can think of no plausible reason for the drafters to have intended such an irrational and ineffectual scheme, I must respectfully dissent.²⁵²

Santa Monica's Condominium Tax Law is such a "traditional, run-of-the-mill revenue-raising" tax. Despite the purpose of the voters who

248. 32 Cal. 3d at 56, 648 P.2d at 940, 184 Cal. Rptr. at 718 (quoting *Amador*, 22 Cal. 3d at 231, 583 P.2d at 1291, 149 Cal. Rptr. at 249).

249. 32 Cal. 3d at 59, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Kaus, J., dissenting).

250. *Id.* at 56, 648 P.2d at 940, 184 Cal. Rptr. at 718. Justice Kaus, in dissent, observed that this was not so:

If the word "special" were completely eliminated, section 4 could be read to require a two-thirds vote of the electorate to authorize *any* tax levied by local entities after July 1, 1978, including the mere continuation of local taxes that were already in place before the adoption of Proposition 13. The inclusion of the modifier "special" in section 4 was intended to make it clear that local entities are permitted to maintain their pre-Proposition 13 nonproperty taxes without a two-thirds voter approval; only "new" or "additional"—i.e., "special"—taxes, which would inevitably replace the property tax revenue withheld by other portions of Proposition 13, are subject to the two-thirds requirement.

Id. at 59, 648 P.2d at 941-42, 184 Cal. Rptr. at 719-20 (Kaus, J., dissenting).

251. *Id.* at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

252. *Id.* at 58, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Kaus, J., dissenting).

enacted Article XIII A, and despite the California Supreme Court's own admonition, in *Amador*, that local taxes were to be construed in light of that electoral purpose,²⁵³ it seems likely that a tax similar to the Condominium Tax Law, if enacted today, would not be subject to the supermajority requirement of section four.

VI. CONCLUSION

In holding that the Map Act and the City of Santa Monica's Condominium Tax Law do not conflict, the supreme court in *Pines* avoided a confrontation with the legislature on the issue of preemption.²⁵⁴ If a conflict had been found, the necessary next step would have been to determine whether state or local law was controlling.²⁵⁵ To uphold the Condominium Tax Law in such a debate, the court would have been required to find that taxation of condominium construction was a municipal affair constitutionally immune from preemption by state legislation. As a result of *Pines*, the court has delayed the confrontation.

In postponing resolution of the issue, however, the court has disturbed the long-standing balance between state and local control of subdivision development, giving local government a power to condition subdivision development that the Map Act itself seems specifically to withhold.²⁵⁶ *Pines* also makes it easier for cities to force new residents to bear a disproportionate share of the cost of local government. Not only does *Pines* permit cities to impose upon new residents costs of subdivision infrastructure previously borne by the taxpayers at large;²⁵⁷ it permits cities to require new residents to assume a disproportionate share of general city expenses. It remains to be seen how cities and counties will make use of these new-found powers.²⁵⁸ Given the ob-

253. See *supra* text accompanying note 239.

254. In *Weekes v. City of Oakland*, 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978), the court declined to resolve a related question: whether the home rule provision of the California Constitution (CAL. CONST. art. XI § 5) prevents the legislature from restricting the revenue-raising efforts of charter cities. *Id.* at 391, 579 P.2d at 451, 146 Cal. Rptr. at 560. Justice Richardson noted in a concurring opinion that the court should resolve the issue to forestall "future litigation over novel municipal levies that are business taxes by designation but arguably are disguised income taxes statutorily prohibited by [the] Revenue and Taxation Code" *Id.* at 398-99, 579 P.2d at 456, 146 Cal. Rptr. at 565 (Richardson, J., concurring). Although a resolution of the specific issue raised in *Weekes* would not have been dispositive of the questions raised in *Pines*, it would have gone far to clarify the muddy waters of "municipal affairs."

255. See *supra* notes 116-21 and accompanying text.

256. See *supra* notes 63-76 and accompanying text.

257. See *supra* text accompanying note 9.

258. Plaintiffs in *Pines* argued that the economic effect of upholding the Condominium Tax Law would be to depress new condominium construction. To support this contention,

served tendency of local government to concern itself primarily with problems of a local nature,²⁵⁹ however, the shift of authority from the state to the local level may be destined to aggravate California's steadily growing housing problem.

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they presented statistics reflecting a downward trend in the number of condominium units constructed, beginning with 1973, the year the Condominium Tax Law was enacted: from 862 units in 1973 to 91 units in 1977. Petition for Hearing at 7, *The Pines v. City of Santa Monica*, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

As Justice Marshall observed in his concurring opinion, the extent to which the marked decline in condominium construction is attributable to the Condominium Tax Law is unclear: "[T]he decline in construction may have been caused by other circumstances, such as spiraling and rampant inflation or condominium builders' tax rebellion." 29 Cal. 3d at 665, 630 P.2d at 525, 175 Cal. Rptr. at 340 (Marshall, J., concurring) (footnote omitted). Nevertheless, it is certain that the tax will increase the cost of condominiums in Santa Monica and in any other community that takes advantage of this new opportunity to use the power granted by the Map Act as a general fund-raising vehicle. If the Tax Law has contributed to the decline in construction noted by plaintiffs, it seems likely that it has caused a corresponding decline in condominium conversion, which could have a salutary effect on the supply of rental housing. Although this result would provide small comfort for would-be purchasers, it would offset to some extent the decline in general housing availability occasioned by the slump in construction.

259. See *supra* text accompanying notes 10-11.

